In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 263

HOWARD DREW WAGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals affirming the conviction is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1965. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including June 16, 1965. The petition for a writ of certiorari was filed on June 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether prosecution of petitioner under 18 U.S.C. 13 for carrying a concealed weapon (as defined and prohibited by New York law) at the United States Military Academy in New York was constitutional.

2. Whether petitioner was deprived of his constitutional right to counsel of his own choice.

3. Whether petitioner's conviction should be reversed because his defense counsel requested, in the presence of the jury, that his reasons for refusing to take the stand be reflected in the record.

4. Whether certain evidence was properly admitted at trial.

STATEMENT

Petitioner was tried and convicted by a jury in the United States District Court for the Southern District of New York of carrying a concealed loaded pistol at the United States Military Academy at West Point, New York, in violation of 18 U.S.C. 13 (R. 487-488).[1] The court suspended the imposition of sentence and placed petitioner on probation for a period of four years (R. 501-502). The court of appeals affirmed the conviction from the bench without written opinion.

The uncontested evidence at trial showed that petitioner came to the quarters of his father-in-law, Sgt.

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[1] Petitioner was acquitted on two counts of assault with intent to commit murder and two counts of assault with a deadly weapon (R. 487-488). The government dropped one count of unlawful possession of a pistol (R. 381).

Gallman, at the United States Military Academy, West Point, New York on August 13, 1963. Gallman, observing a bulge in petitioner's trench-coat pocket, concluded that petitioner was carrying a gun. He asked petitioner what he was carrying in his pocket, but petitioner did not answer (R. 243-245). Gallman then engaged in a struggle with petitioner during which a gun in petitioner's pocket was discharged twice. One bullet struck petitioner's estranged wife and one bullet struck petitioner and Gallman in the hands. Gallman took the gun from petitioner and turned it over to the military police upon their arrival at the scene (R. 67-70, 97-103, 189, 244-248, 255-256). Defense counsel conceded in opening and closing argument that petitioner came to the home of Gallman armed with a loaded pistol in his pocket (R. 49, 447, 450-451).

ARGUMENT

1. Petitioner contends (Pet. 16-17) that his conviction under 18 U.S.C. 13 for carrying a concealed weapon in violation of the provisions of New York Penal Law § 1897(2) (1963) is unconstitutional because the State statute discriminates inpermissibly between residents and non-residents of the State. He asserts that the New York licensing provisions (New York Penal Law § 1903 (1963)) make it impossible for him, a non-resident of New York, to obtain a license, and that a federal conviction may not be based on a statute which applies unequally in this manner. This contention is without merit. First, pe-

titioner never made any effort to obtain a license, and he is not, therefore, in a position to challenge the validity of his conviction on the ground that his license was improperly denied.[2] In any event, the licensing statute does not exclude non-residents. Indeed, it provides that a license to carry a concealed weapon "shall be issued to * * * any person when proper cause exists for the issuance thereof" (Pet. App. B, pp. 22-23). It provides expressly (Pet. App. B, p. 27):

> If such license is issued to an alien, or to a person not a citizen of and usually a resident in the state, the licensing officer shall state in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant.

2. Petitioner's assertion that he was denied effective assistance of counsel of his choice (Pet. 16) is refuted by the record. Petitioner hired his trial counsel approximately three weeks before trial and, on the day set for trial, retained counsel announced that he was ready for trial (R. 118). After the trial had begun, petitioner complained to the trial judge that his counsel was not familiar enough with the facts of the case to conduct a competent cross-examination (R. 109-123, 332-334). Petitioner said he had no doubt that counsel was competent, but that he did not know

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[2] The statute makes it an offense to carry a concealed loaded pistol. Another provision—New York Penal Law § 1900(3) (1963)—excepts persons holding a valid license. Petitioner obviously violated the criminal statute and has not shown that his violation is attributable to any discriminatory application of § 1900(3).

the facts (R. 114). The court then arranged that petitioner would have time that afternoon to acquaint his counsel with the facts and permitted the defense to recall a government witness for further cross-examination (R. 109-110, 116, 119-120, 122). Defense counsel said he was aware of the facts petitioner had in mind but that they were not relevant to the case (R. 120-121). Petitioner elected to continue the trial with his retained counsel (R. 122). Toward the end of the trial, petitioner again complained of the way counsel was handling the case (R. 354-370) and again stated that he did not question counsel's ability as an attorney (R. 357). Counsel reiterated that he knew the facts petitioner wanted brought out and that they were not relevant (R. 358-359). Petitioner elected to continue with counsel (R. 369).[3] At the conclusion of the prosecution and defense evidence, petitioner asked the court to dismiss counsel (R. 441). In the circumstances, the court properly refused to adjourn the case to let petitioner find another lawyer (R. 427-428, 442). After the jury acquitted petitioner on all counts except possession of a concealed loaded pistol, the court expressed its opinion that defense counsel had done "a very good job." Petitioner agreed and apologized to the court for the way he had acted (R. 495).

3. Petitioner complains that he was prejudiced when his counsel advised the court in the presence of

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[3] Because of petitioner's interference in counsel's conduct of the trial (R. 422-436), counsel asked to be allowed to proceed by way of assignment, which was done (R. 369-370).

the jury that petitioner refused to testify and that counsel wanted petitioner's reasons stated for the record (Pet. 3). The record shows that the court then had the jury removed, and further discussion on this matter was carried on outside the hearing of the jury (R. 437-443). Considering the difficulties defense counsel encountered with petitioner, it was reasonable for him to take the precaution of putting petitioner on record concerning his failure to testify. There is no reason to believe that petitioner was prejudiced because counsel's initial statement was made in the presence of the jury.

Moreover, the court instructed the jury that the defendant does not have to take the witness stand in his own defense and the fact that he has not taken the stand is not to be considered in determining his guilt or innocence (R. 470). Hence, the jury was aware, as its acquittal of petitioner on the four other counts confirms, that it was not to consider petitioner's failure to testify as evidence of guilt.

4. Contrary to petitioner's contention (Pet. 3-4, 13), the gun and bullets taken from petitioner by Gallman were properly and positively identified as the weapons possessed by petitioner on the date of his visit to West Point (R. 313-315, 327). The gun was initialed by the officer who arrived at the Gallman home shortly after the shooting (R. 327).

Petitioner's assertion that the gun was taken from him during an illegal search and seizure by Gallman (Pet. 4, 13-14) is without merit. Gallman was not acting in any governmental capacity. He was, moreover, taking necessary precautions in self-defense

against a threat to his home and family. The weapon was actually removed from petitioner's pocket after two shots had been fired and three persons injured.

Petitioner also complains that testimony regarding an interview between himself and an F.B.I. agent prior to his arraignment was erroneously admitted (Pet. 4, 7-11). The record shows that, upon petitioner's objection, government counsel elected to withdraw the witness rather than interject the *Mallory* question into the case (R. 337-341). A portion of the interview was related by the witness before any objection was made. Apparently defense counsel permitted this limited line of questions in order to open the door for advantageous cross-examination—which made up the bulk of the testimony of the F.B.I. agent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1965.

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